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# Eminent Domain — Interest of the Condemnee in Mineral Rights

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### **Eminent Domain—Interest of the Condemnee in Mineral Rights**

In 1920 the Oklahoma Legislature passed an act authorizing condemnation of forty acres of land "for State Capitol building purposes."<sup>1</sup> Defendant condemnee was paid \$80,000 for land condemned pursuant to the Act. Sixteen years later, defendant condemnee executed an oil and gas lease to the defendant Jones. The question of whether the mineral rights passed from the condemnee to the state immediately came of issue. In an action brought by the State to quiet title it was held that the State acquired a full fee title when the land was con-

<sup>1</sup> Okla. Stat. tit. 73, § 83 (1938).

demned, so the defendant condemnee retained no rights in the mineral deposits.<sup>2</sup>

Analogous situations present the important problem of whether the interest taken by the condemnor is such as to exclude any claim the condemnee might have to mineral rights. An examination of the nature of title acquired in eminent domain proceedings and its effect upon disposition of mineral rights, with particular attention to protection of the condemnee's interests, is the purpose of this note.

Generally speaking, the Federal and State Constitutions contain clauses to the effect that "private property shall not be taken for public use without just compensation."<sup>3</sup> Although the power of eminent domain is said to be a power inherent in the sovereign and dependent upon neither constitution nor statute,<sup>4</sup> constitutional clauses like that referred to are usually considered the basis of the sovereign's right to exercise eminent domain. Whether constitution or inherent power be accepted as the basis of the right of eminent domain, plenary power to determine when the right may be exercised rests with the legislatures.<sup>5</sup> Together with the right to authorize its exercise, the legislatures hold the power (1) to determine the extent of taking which is reasonably necessary to satisfy the public purpose sought to be served, and (2) to define the interest or estate which may be taken.<sup>6</sup>

While the legislatures have plenary power concerning the exercise of eminent domain, constitutional limitations state that the taking must be for a "public purpose." These limitations theoretically provide an ultimate check upon the discretion of the legislatures.<sup>7</sup> The courts generally construe this constitutional protection to mean that only such interest may be acquired in condemned property as is reasonably necessary for the accomplishment of the public purpose involved.<sup>8</sup> From this it might seem that in every case there will be a judicial question of whether the taking is of such nature that it is or may be founded upon a public necessity. But the courts have been steadfast in holding that when the legislature has clearly decreed that a specific interest may be taken, the question of necessity or expedi-

<sup>2</sup> *Harn v. State ex rel. Williamson*, 184 Okl. 306, 87 P.2d 127 (1939).

<sup>3</sup> See 1 Nichols, *Eminent Domain* § 1.3 (3d ed. 1950) for a table of constitutional provisions relative to eminent domain in the various states.

<sup>4</sup> *Burnett v. Central Nebraska Public Power & Irr. Dist.*, 147 Neb. 458, 23 N.W.2d 661 (1946).

<sup>5</sup> *Valentine v. Lamont*, 20 N.J. Super. 454, 90 A.2d 143 (1952); *Burnett v. Central Nebraska Public Power & Irr. Dist.*, 147 Neb. 458, 23 N.W.2d 661 (1946).

<sup>6</sup> *State ex rel. Mitchell v. State Highway Commission*, 163 Kan. 187, 182 P.2d 127 (1947); *Shoemaker v. United States*, 147 U.S. 282 (1893).

<sup>7</sup> *Lynch v. Forbes*, 161 Mass. 302, 37 N.E. 437 (1894); 1 Nichols, *Eminent Domain* § 4.11 (3d ed. 1950).

<sup>8</sup> *Whitworth v. Mississippi State Highway Commission*, 203 Miss. 94, 33 So.2d 612 (1948); *Houck v. Little River Drainage Dist.*, 343 Mo. 28, 119 S.W.2d 826 (1938).

ency will be the subject of judicial review only in flagrant cases.<sup>9</sup> Indeed, some courts expressly decline to review the necessity or public purpose involved in the taking.<sup>10</sup> And even those courts that have frequently declared their power to set aside legislative acts upon grounds of no public necessity have rarely exercised their vaunted power.<sup>11</sup>

Since broad discretionary power concerning the exercise of eminent domain rests with the legislatures, the extent of taking authorized in a given condemnation proceeding will primarily depend upon construction of the statute authorizing and delimiting that particular exercise of power.<sup>12</sup> A clear legislative mandate authorizing the taking of a fee simple absolute, which necessarily will contain all lesser estates including mineral rights,<sup>13</sup> will be almost invariably upheld by the courts.

New Jersey held, however, that the legislatures could authorize no more than the taking of a base fee, limited to the use for which the property was appropriated.<sup>14</sup> The New Jersey Constitution was amended in 1947 to allow a fee simple absolute to be taken.<sup>15</sup> It provides that the condemnor "may be authorized by law to take or otherwise acquire a fee simple absolute or any lesser interest."

In addition to the authorizing statute, the condemnation petition and procedure will also govern the nature of title acquired by the condemnor. Under the judicial method, which is used by a great majority of the states and the federal government, the condemnor acts as plaintiff in the condemnation action. Hence, the nature and extent of the estate or interest sought to be taken must be clearly set out in the condemnation petition.<sup>16</sup> Once condemnation becomes final, the extent of title acquired is limited to the extent of taking described in the condemnation judgment.<sup>17</sup>

The nature of title acquired by a condemnor will depend, then, upon (1) the extent of taking authorized by statute, and (2) the extent of taking recited in the condemnation judgment. It seems clear that if a statute authorizes and the condemnation judgment decrees the

<sup>9</sup> See note 7 *supra*.

<sup>10</sup> 1 Nichols, *Eminent Domain* § 4.11 (3d ed. 1950).

<sup>11</sup> *Ibid*.

<sup>12</sup> *Newton v. Perry*, 163 Mass. 319, 39 N.E. 1032 (1895); *Burnett v. Central Nebraska Public Power & Irr. Dist.*, 147 Neb. 458, 23 N.W.2d 661 (1946).

<sup>13</sup> *Harn v. State ex rel. Williamson*, 184 Okl. 306, 87 P.2d 127 (1939); *Parish of Jefferson v. Texas Co.*, 192 La. 934, 189 So. 580 (1939).

<sup>14</sup> *Summerill v. Hunt*, 25 N.J. Misc. 498, 55 A.2d 833 (1947).

<sup>15</sup> N.J. Const. Art. IV, § 6.

<sup>16</sup> *Pontiac Improvement Co. v. Board of Commissioners of Cleveland Metropolitan Park District*, 104 Ohio 447, 135 N.E. 635 (1922).

<sup>17</sup> *Martin v. City of Bethany*, 199 Okl. 57, 182 P.2d 517 (1947); *Parish of Jefferson v. Texas Co.*, 192 La. 934, 189 So. 580 (1939).

appropriation of a fee simple absolute, such estate taken includes minerals lying beneath the surface.<sup>18</sup>

The real problem arises where either the authorizing statute or condemnation judgment, or both, are silent or ambiguous as to the interest taken. The legislature of Texas has passed a statute which protects the condemnee's right to minerals in such a case.<sup>19</sup> The Texas statute provides that "except where otherwise expressly provided by law, the right secured [by the condemnor] . . . shall not be so construed as to include the fee simple estate . . ." In other words, where the mineral rights are disputed after condemnation of land under a given statute, the statute cannot be construed to authorize taking a fee simple absolute (and accompanying mineral rights) unless the statute has expressly authorized such taking.<sup>20</sup> In cases where the statute is ambiguous, effective argument may be advanced by the condemnee that since the condemnor got something less than a fee simple absolute, the latter's interest did not include mineral rights.

A Nebraska statute has gone further in reserving mineral rights than the Texas statute. It provides that in condemnation of state educational land by counties for county fair purposes, "a condemnor cannot acquire any mineral rights in lands taken . . ."<sup>21</sup>

In absence of such clear legislative mandates conflicting concepts of construction come into play. In view of the prevailing rule that only such interest may be acquired as is necessary for the public purpose involved, the courts may be inclined to leave the fee and accompanying mineral rights with the owner.<sup>22</sup> That is, eminent domain statutes will be strictly construed against the condemnor.<sup>23</sup> However, it has been held that in absence of clear statutory authorization, by virtue of the sovereign's interest the title will be construed to be a fee simple absolute.<sup>24</sup>

Which of the above concepts will be applied in a given case may depend upon the general character of the condemnor, whether it be a (1) governmental body, its subdivision, or agency, (2) a public service corporation, or (3) a private enterprise. The courts tend to be more liberal in favor of the full taking where the condemnor is a govern-

<sup>18</sup> See note 12 *supra*.

<sup>19</sup> Tex. Stat. tit. 52, § 3270 (1952).

<sup>20</sup> *Dickey's Estate v. Houston Independent School Dist.*, 300 S.W. 250 (Tex. Civ. App. 1927).

<sup>21</sup> Neb. Rev. Stat. § 72-223 (Reissue 1950).

<sup>22</sup> *Hays v. Walnut Creek Oil Co.*, 75 W.Va. 263, 83 S.E. 900 (1914).

<sup>23</sup> *Sheridan County v. Davis*, 61 N.D. 744, 240 N.W. 867 (1932); see also 1 Nichols, *Eminent Domain* § 3.213 (3d ed. 1950) and cases cited therein.

<sup>24</sup> *Crockett Land & Cattle Co. v. American Toll Bridge Co. of California*, 211 Cal. 361, 295 Pac. 328 (1931); *Laramie Valley Ry. Co. v. Gradert*, 43 Wyo. 268, 3 P.2d 88 (1931).

mental unit.<sup>25</sup> To further complicate the situation, courts often differ in similar cases or even in the same fact situation as to the extent of taking justified in pursuit of the public purpose involved.

The 1946 Nebraska case of *Burnett v. Central Nebraska Public Power & Irr. Dist.*, illustrates the point well.<sup>26</sup> The condemnor, a public power and irrigation district, appropriated lands of the condemnee for use in an internal power and irrigation improvement project. Condemnation was authorized concurrently by federal and Nebraska statutes.<sup>27</sup> The Nebraska statute provided that "... (the condemnor) shall have the right to acquire, either by purchase or condemnation, all lands and waters and other property necessary for the construction, use, maintenance, repair, and improvement of any canal, canals, power plants of any kind or nature, and lands for reservoirs for the storage of water and all necessary appurtenances."<sup>28</sup> The land was to be used for the purpose of storing water. Judgment in the condemnation proceeding stated "... that the plaintiffs . . . have and recover from the defendant . . . the sum of \$53,326.75 in full and complete satisfaction of any and all damages against said defendant by reason of the defendant's taking and appropriating the lands of the plaintiff's . . . for the uses and purposes as related in the application of the defendant."

Subsequent to condemnation the land was flooded, but during certain intervals the land remained dry long enough for the condemnor to harvest valuable crops of hay. Condemnee brought declaratory judgment action to have the interest acquired by the condemnor declared merely an easement, that the condemnee might get damages for the hay which was harvested and also for any use of the land other than for the express purpose of the taking. A majority of the Nebraska court held that (1) the statutes authorized the taking of a fee simple absolute, (2) the condemnation judgment decreed the taking of a fee simple absolute, (3) the public purpose involved necessitated the taking of a fee simple absolute, and (4) the condemnee, since he had made no objection to the extent of taking during the condemnation proceeding, had no ground for later complaint. The condemnor was granted full fee title. On the other hand, three dissenting justices decided that (1) the authorizing statutes were ambiguous as to the interest that could be taken, (2) the condemnation judgment recited damages for use of the land and not the taking of a fee simple absolute, (3) the

<sup>25</sup> *Baxter v. City of Louisville*, 224 Ky. 604, 6 S.W.2d 1074 (1928); 2 Nichols, *Eminent Domain* § 7.5 (3d ed. 1950).

<sup>26</sup> *Burnett v. Central Nebraska Public Power & Irr. Dist.*, 147 Neb. 458, 23 N.W.2d 661 (1946).

<sup>27</sup> 41 Stat. 1074 (1920), 16 U.S.C. § 814 (1946); Neb. Rev. Stat. § 46-125 (Reissue 1952); Neb. Rev. Stat. §§ 70-625, 70-626, 70-627, 70-667, 70-670 (Reissue 1950).

<sup>28</sup> Neb. Rev. Stat. § 46-125 (Reissue 1952).

public use involved did not justify condemnation of a fee simple absolute, and (4) the condemnee should not have been expected to raise his objections during the condemnation proceeding. The majority and dissenting opinions were thus in complete disagreement on both the construction of the statute and the extent of title taken as recited by the condemnation judgment.

Since a final disposition of mineral rights will depend upon a construction process like that undertaken in *Burnett v. Central Nebraska Public Power & Irr. Dist.*, it is apparent that the position of the condemnee may be somewhat precarious. If he delays attempt to retain mineral rights until judgment has been entered and compensation accepted, it may then be too late for him to raise any constitutional objection concerning the extent of taking, as such objections may be deemed to have been waived.<sup>29</sup> The only remaining course of action for the condemnee lies in gaining a construction of the authorizing statute and condemnation judgment which will result in retention of mineral rights. But as indicated previously, conflicting rules of statutory construction and different judicial concepts concerning the extent of taking deemed necessary may make quite doubtful the result of final disposition of mineral rights.

In view of these uncertainties in title which jeopardize the condemnee's interest in mineral rights, what steps can be taken to protect his interests? Where the condemnee is able to establish in court the value of mineral rights and is willing to part with them, no great problem exists since evidence of value may be submitted and the court must include such value in its award of compensation. However, frequently the condemnee may have reason to believe that valuable mineral deposits exist under his land, but may anticipate great difficulty or impossibility of establishing proof of this value. Herein lies his problem. If the condemnee allows such rights to be taken from him by condemnation, the award of compensation he will receive for these rights will be extremely inadequate. Rather than relinquish what could subsequently prove to be a very valuable interest in his land the condemnee should take steps to reserve his mineral rights.

Since direct negotiation for purchase always precedes actual condemnation proceedings, attempt should be made to exclude mineral rights from the deed of conveyance. Should negotiation fail, a similar attempt should be made to reserve mineral rights by consent of the condemnor. If these efforts fail, a more advantageous position from which to oppose condemnation may be attained by a severance of minerals from the remainder of the fee.<sup>30</sup> Such severance may be made by conveyance of the mineral interest in the land to another, as

<sup>29</sup> *Mayo v. Windels*, 255 App. Div. 22, 5 N.Y.S.2d 690 (1938).

<sup>30</sup> *Bodcaw Lumber Co. v. Goode*, 160 Ark. 48, 254 S.W. 345 (1923).

for example the husband or wife of the condemnee. The condemnor must then join the party holding title to the mineral rights for "... the condemnation is void as to all persons not made parties thereto."<sup>31</sup>

The condemnor may be reluctant to bring in this other party where justification of condemnation of mineral rights as being necessary for the accomplishment of the public purpose involved might be difficult. Such would be true in those cases where reservation of the mineral rights by the condemnee would be consistent with the intended use by the condemnor of the property being condemned. Of course, whether reservation of mineral rights would be thus consistent may be disputable, and the condemnor may proceed to join the party holding title to the minerals notwithstanding the separate conveyance. But the condemnee may have gained a more favorable position from which to urge reservation of mineral rights should he wish to do so. Such advantage may be sufficient to serve the interests of the condemnee adequately.

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<sup>31</sup> *Daniel Dodge v. Omaha & Southwestern Ry.*, 20 Neb. 276, 29 N.W. 936 (1886). The nature of title acquired by a condemnor will depend, in addition to limits imposed by the authorizing statute and the condemnation judgment, upon proper joinder and notice to parties holding an interest in the property when the condemnation is undertaken. The importance of proper joinder may depend in turn upon the underlying theory to which the court subscribes concerning nature of title acquired in condemnation. Some courts have considered eminent domain proceedings to be actions in rem and something in the nature of a forfeiture, while most others consider the action to be more in the nature of a compulsory sale, binding only upon those parties joined in the condemnation proceedings.